

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY E. GROSE and DEPARTMENT OF HEALTH, EDUCATION &  
WELFARE, HEALTH & HUMAN SERVICES, Beckley, WV

*Docket No. 00-1966; Oral Argument Held October 18, 2001;  
Issued November 27, 2001*

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Appearances: *Mary E. Grose, pro se; Jim Gordon, Jr., Esq.*  
for the Director, Office of Workers' Compensation Programs.

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On January 28, 1993 appellant, then a 46-year-old retired contact representative, filed an occupational disease claim alleging that her carpal tunnel syndrome (CTS) had been caused by job duties. She documented the pain and suffering in her fingers, arms and hands, which included "severe nerve damage in my right hand" and "borderline damage in my left hand." Appellant also submitted an August 26, 1992 report from Dr. Joe Othman, a Board-certified neurologist, of a nerve conduction study (NCS) which found that appellant suffered from right CTS and borderline CTS on the left with no evidence of ulnar neuropathy.

The Office eventually accepted the claim for right carpal tunnel syndrome.

Subsequently, appellant submitted additional medical records relating to treatment for an ulnar nerve condition. She also enclosed December 2, 1993 NCS and electromyogram (EMG) reports from Dr. Othman, showing that both upper extremities exhibited borderline right ulnar neuropathy.

By letters dated June 8, 1994, the Office advised appellant that her condition was accepted for right carpal tunnel syndrome and not for an ulnar nerve condition. The Office asked appellant to submit a current medical report that supported the causal relationship of her ulnar nerve condition to her previously accepted condition of right CTS.

In a decision dated November 8, 1995, the Office denied appellant's claim for compensation for a right ulnar nerve condition.

Appellant requested an oral hearing, which was held on December 3, 1996. She was advised that she needed a definite statement of causation, *i.e.*, a medical opinion tying the

condition to specific work-related factors. The hearing representative held the record open to allow appellant to obtain such an opinion.

On January 29, 1997 appellant submitted a report from Dr. Frank C. McCue, a Board-certified orthopedic surgeon, who stated that an ulnar nerve condition occurs in many different situations and that “[i]n those who work on jobs with repetitive type activities, it is a major inciting cause.” She also included a December 5, 1996 report from Dr. Syed A. Zahir, a Board-certified orthopedic surgeon, who stated, “[t]he two conditions are interrelated, they appear to be work related.”

By decision dated February 18, 1997, the Office hearing representative affirmed the November 8, 1995 decision.

On February 11, 1998 appellant requested reconsideration and provided additional reports. In progress notes from May 9 to June 17, 1997, Dr. Zahir indicated that the CTS was definitely related to appellant’s work, but that he “would like Dr. McCue to address the situation of her ulnar nerve entrapment.” He further opined that “[h]er carpal tunnel and conditions associated with the carpal tunnel are related to work.”

In a February 3, 1998 letter, Dr. McCue stated that he was unable to determine what percentage of appellant’s condition would be caused by work. He further opined that the activities which appellant engaged in at work could cause the involvement itself or the injury or aggravate a preexisting case as far as increasing the symptoms was concerned. Appellant also supplied an August 19, 1997 operative report for carpometacarpal arthritis.

In a November 24, 1998 merit decision, the Office denied modification of its prior decision on the grounds that appellant had not submitted sufficient evidence to establish that her ulnar nerve condition was causally related to her employment.

Appellant requested reconsideration on November 16, 1999. In a November 15, 1999 report, Dr. Zahir stated that appellant had been under his care since 1992 for bilateral carpal tunnel. Dr. Zahir stated that an EMG/NCS study done by Dr. Othman in 1993 showed left carpal tunnel syndrome with moderately severe ulnar nerve neuropathy at the level of the elbow. He opined that “[t]he carpal tunnel and ulnar nerve neuropathy is definitely a work-related condition.”<sup>1</sup>

In a February 18, 2000 decision, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was cumulative and thus insufficient to warrant a merit review of its prior decision.

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed her appeal with the Board on May 12, 2000, the Board lacks jurisdiction to review

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<sup>1</sup> The record contains a 1992 EMG showing no evidence of neuropathy and the 1993 EMG showing mild neuropathy.

<sup>2</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

the Office's most recent merit decision dated November 24, 1998. Consequently, the only decision properly before the Board is the Office's February 18, 2000 decision denying appellant's request for reconsideration.

The Board finds that the Office acted within its discretion in denying merit review.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation: "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

Under section 10.606(b)(2) of the implementing regulation, a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>3</sup>

In this case, relevant and pertinent new medical evidence did not accompany appellant's request for reconsideration. This is important since the underlying issue in the claim, whether appellant's ulnar nerve condition and surgery were causally related to her duties as a contact representative, is essentially medical in nature.

The November 15, 1999 report from Dr. Zahir, who stated that the "carpal tunnel and ulnar nerve neuropathy is definitely a work-related condition" is cumulative in that it essentially repeated Dr. Zahir's previous opinion on June 19, 1997, that "her carpal tunnel and conditions associated with the carpal tunnel are related to work." He repeated this conclusion in his December 5, 1996 report when he stated the "two conditions are interrelated, they appear to be work related."

The Board finds that Dr. Zahir's November 15, 1999 report is not relevant and pertinent new evidence not previously considered by the Office and is insufficient to require a merit review under 20 C.F.R. § 10.606(b)(2). Thus, the Office's denial of appellant's request for review of the merits of her claim was proper.

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<sup>3</sup> 20 C.F.R. § 10.608(b) (1999).

The decision of the Office of Workers' Compensation Programs dated February 18, 2000 is hereby affirmed.

Dated, Washington, DC  
November 27, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

Priscilla Anne Schwab  
Alternate Member